Court, U.S.

No. 01-677 AUG 09 2001

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In the Supreme Court of the United States

CARMEN LEVERETTE,

Petitioner,

v.

MARGARET BELL, in her individual capacity,

Respondent.

and

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Defendant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a visual body cavity search of a corrections officer based on mere reasonable suspicion, rather than probable cause, violate the Fourth Amendment's constitutional protection against unreasonable searches and seizures?

2. Are the parameters of a government official's discretionary authority for qualified immunity purposes established by the government agency's policies and practices?

3. Is a government official acting within the scope of her employment for qualified immunity purposes, when she knowingly acts contrary to the government agency's own rules and regulations?

PARTIES TO THE PROCEEDING

Petitioner
Carmen Leverette

Respondent
Margaret Bell

Defendant
South Carolina Department of Corrections

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Carmen Leverette v. Margaret Bell, et al.*, is reported at 237 F.3d. 160 (2001). Copies of that opinion, and the Order denying the Petition for Rehearing, are included in the Appendix at pages A-1 and A-16. The Orders of the District Court for the District of South Carolina are included in the Appendix at pages A-18 and A-19.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its opinion in *Carmen Leverette v. Margaret Bell, et al.*, on April 13, 2001. The Court denied the Petitioner's Petition for Rehearing with Petition for Rehearing *En Banc*, on May 11, 2001. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1990, the Petitioner Carmen Leverette ("Leverette") went to work as a correctional officer for the South Carolina Department of Corrections ("SCDC"). In 1992, she was working as a prison guard at the Wateree River Correctional Institution ("WRCI").

SCDC Policy No. 1500.11 specifically limits individual searches of employees, inmate visitors, and others, to

"scan searches," "frisk searches," or "strip searches." The policy expressly prohibits body cavity searches of employees.[1]

Employees may be subjected to an individual search at the discretion of the institution head, who also determines the type of search to be conducted. A "strip search" of an employee must be based on specific, objective facts, supported by information from reliable sources, which must be reduced to writing prior to, or immediately after, the institution head (or other appropriate official) approves a request to search. The employee to be searched must sign a written consent before the search is conducted, and if the employee refuses to consent, she may be denied admission to, or ejected from, the facility, and disciplined.

In 1996, after a drug dog reacted to her car during a random search of all incoming vehicles, Leverette was strip searched, consisting of a strip, squat and cough, by the Respondent Margaret Bell ("Bell"), an assistant warden at WRCI, and two female correctional officers. The search revealed no contraband, and Leverette proceeded to her assigned work post. This was the only time Leverette was searched between 1992 and February 1998, and she had an excellent employment record as a correctional officer.

On February 2, 1998, a WRCI inmate allegedly informed Bell he had overheard other inmates talking about buying marijuana on the street, which Leverette was allegedly bringing into the institution in a tampon

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[1]At all times relevant to this action, Policy No. 1500.11 was the only policy regarding searches of SCDC employees. The policy has been superseded several times to the extent it relates to inmate searches.

when she returned to work on February 4. This informant, who has never been identified, had allegedly provided accurate information to other law enforcement agencies on previous occasions, and had told Bell about another inmate's possession of drugs.[2]

Bell discussed the matter with WRCI's warden, John Carmichael ("Carmichael"), who authorized Bell to conduct a "strip search" of Leverette when she arrived at the prison. Carmichael and Bell did not discuss a body cavity search, and Carmichael did not authorize such a search.

Leverette returned to work on February 4, and was immediately escorted into Bell's office, where Carmichael was waiting. Carmichael stated there was information Leverette was bringing contraband into the institution, and that she would be "strip" searched. Carmichael then summoned two female officers to Bell's office. Upon their arrival, Leverette was instructed to take off her clothes, which were searched by Bell and the officers.

When the search of her clothes and belongings was completed, Leverette started to put her clothes on, but Bell told her to wait until the institution's nurse arrived

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[2]During her deposition, Bell was unable to recall the inmate's name, or the names of the other inmates he allegedly overheard saying that Leverette was bringing drugs into the prison. Bell's knowledge regarding the inmate's previous work with other law enforcement agencies was merely an impression she got from conversations she overheard during a meeting in her office. She did not know the specifics, or accuracy, of the information the inmate allegedly provided to other agencies. As to the inmate's alleged information regarding another inmate, Bell could not even recall the identity of the inmate who allegedly possessed the drugs. In short, Bell's knowledge was remarkable only in terms of what she did not know about the inmate's reliability.

because they were going to do a "body cavity search."[3] Leverette sat in a chair, completely naked, until the nurse arrived. When the nurse entered the office, anyone standing in the lobby outside Bell's office had a clear view of Leverette.

After the nurse arrived, Bell started giving Leverette instructions regarding exposing her anal and vaginal orifices. Bell repeatedly said she could not "see," and Leverette was ultimately required to bend over to the point where her hands touched the floor in front of her, and then hold her buttocks apart, so that Bell and the nurse could closely examine her rectum. Leverette was then instructed to sit at the edge of a chair, and open her legs, so that Bell and the nurse could examine her vaginal opening. Again, Bell repeatedly said she could not "see," and Leverette had to open her legs wider, and ultimately, hold open her labia, with Bell and the nurse within a foot of her genital area.

The two female officers summoned to conduct the strip search were still present in the office, and both were extremely upset by the way Bell conducted the body cavity search of Leverette. Neither of the officers, nor the nurse, had ever participated in any employee searches such as the one to which Leverette was subjected.[4] None of these individuals witnessed Leverette sign any consent

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[3]Bell testified, and the Fourth Circuit found, that Bell and Carmichael discussed having the nurse present during the search. Carmichael testified, however, that he found about about the nurse's presence after the search was concluded. This is but one example of the Fourth Circuit's failure to view all the evidence in the light most favorable to Leverette.

[4]One of the officers was reduced to tears, and intimidated, by the way Leverette was treated.

form related to the routine strip search, or the body cavity search.[5]

The invasive search of Leverette's person and belongings revealed no contraband. After her vehicle was also thoroughly searched, Leverette was eventually allowed to proceed to her work station.

Leverette commenced this action in February 1999, alleging that Bell violated Leverette's constitutional rights under the Fourth Amendment. She also asserted a negligence claim against SCDC, which she voluntarily dismissed without prejudice. Bell moved for summary judgment, asserting the doctrine of qualified immunity, and filed an interlocutory appeal from the district court's denial of that motion.

The Court of Appeals for the Fourth Circuit reversed the denial of Bell's motion, and remanded the case for entry of judgment in Bell's favor. The court found that Bell was acting within the scope of her authority as an assistant warden of WRCI when she ordered and conducted the body cavity search of Leverette. It held that Bell was protected by the qualified immunity defense because body cavity searches of correctional officers need only be based on "reasonable suspicion," and since Bell had such suspicion arising from the alleged informant's information, the search at issue did not violate Leverette's constitutional rights. The Court subsequently denied Leverette's Petition for Rehearing with Rehearing En Banc.

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[5]When the search was over, Bell had Leverette sign a consent form, which related to "frisk" and "strip" searches, not body cavity searches.

REASONS FOR GRANTING THE PETITION

Visual body cavity searches of prison employees should be based on probable cause rather than mere reasonable suspicion, and there is a split in the circuits on this issue, which should be resolved.

The Fourth Amendment vests individuals with the right to be free from "unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979). A legitimate governmental purpose may render a particular intrusion into an individual's privacy reasonable. *Bell*, 441 U.S. at 558 (1979).

The government's interest in maintaining prison security has served as the basis for allowing certain warrantless searches of inmates, pretrial detainees, prison visitors, and prison employees. *Bell*, 441 U.S. at 560 (strip search of pretrial detainees); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (strip searches of prison employees based on reasonable suspicion); *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) (strip search of prison visitors requires reasonable suspicion); *Blackburn v. Snow*, 771 F.2d 556 (1st 1985) (strip search of prison visitors requires reasonable suspicion); *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187 (2nd Cir. 1984) (strip search of prison employees requires reasonable suspicion, but visual body cavity searches require a warrant based on probable cause). Prisons are not, however, beyond the reach of the Constitution. *Bell*, 441 U.S. at 547.

This Court has held that incarcerated individuals retain some Fourth Amendment rights. *Bell*, 441 U.S. at 558. Clearly, prison employees, as non-convicted, unincarcerated individuals, retain certain, albeit diminished, expectations of privacy while they are on the job. *Carey*, 737 F.2d at 201-202.

Visual body cavity searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission . . .." *Carey*, 737 F.2d at 207 (citations omitted); see also *Blackburn*, 771 F.2d at 564; *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894, 899 (1995). Such searches "represent one of the most grievous offenses against personal dignity and common decency." *Bell*, 441 U.S. at 576-577 (Marshall, J., dissenting). In concluding that body cavity searches on pretrial detainees were constitutional in light of the prison system's legitimate security concerns, this Court stated that "[a]dmittedly, this practice instinctively gives us the most pause." Id., 441 U.S. at 558.

Based on the prison employees' reasonable expectations not to be subjected to unreasonable intrusions into their privacy, balanced against the extent of the intrusion inflicted by visual body cavity searches, the Second Circuit held that such searches must be based on probable cause, and prison officials must obtain a warrant before subjecting a prison employee to a visual body cavity search. *Carey*, 737 F.2d at 207-208. The Fourth Circuit's holding in this case that visual body cavity searches of correctional officers need only be based on "reasonable suspicion," is directly contrary to the Second Circuit's decision in *Carey*. Review of this case will permit the Court to resolve the conflict between the

circuit courts regarding the extent to which correctional officers abandon their expectation of privacy, and waive their constitutional protection against unreasonable searches and seizures, by merely accepting employment in a correctional institution.

In concluding that the search at issue was a constitutionally permissible activity, the Fourth Circuit balanced Leverette's expectation of privacy against the prison system's "manifest interest in preventing the introduction of drugs, weapons, and other contraband." (Appendix at page A-12). When balancing these interests, however, the Fourth Circuit blatantly ignored the State of South Carolina's determination, by and through SCDC, that correctional facility employees' privacy rights are paramount on the issue of body cavity searches.

SCDC's policies and procedures provide for "strip" searches of employees on the basis of "specific objective facts supported by information from reliable sources that a specific person (the person to be searched) is attempting to introduce contraband into the institution." SCDC Policy No. 1500.11, ¶19. (Appendix at page A-28). The policy strictly governs the circumstances for conducting inmate body cavity searches, and specifically prohibits body cavity searches of employees. SCDC Policy No. 1500.11, ¶3 (Appendix at page A-22). As the prison system administrator, SCDC was clearly in the best position to balance the competing interests of the system and its employees, and it determined that at least with respect to body cavity searches, the employees' interests and expectations of privacy prevail.

In the face of this express policy prohibition of employee body cavity searches, as a SCDC employee,

Leverette's legitimate expectations of privacy included the right to be free of body cavity searches in the absence of a warrant based on probable cause.[6] The Fourth Circuit determined, however, that even with the prison system's express policy prohibition of such searches, "prison authorities generally may conduct a visual body cavity search when they possess a reasonable and individualized suspicion that an employee is hiding contraband on his or her person." (Appendix at page A-12).

In *Bell*, this Court admonished courts to accord deference to prison administrators in the adoption and execution of prison policies and practices they deem necessary to preserve prison security. 441 U.S. at 547. Obviously, SCDC did not deem it necessary to prison security to institute a policy requiring prison employees to submit to body cavity searches of any kind.[7] Rather than defer to SCDC's decision, however, the Fourth Circuit substituted its judgment for the prison administrator's judgment regarding the proper balance of

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[6]This case does not involve "exigent circumstances" that might constitute an exception to the warrant requirement. There was ample time between Bell's alleged receipt of the information, and Leverette's scheduled return to work, for Bell and/or Carmichael to put their information before a judge and seek a search warrant.

[7]There is no evidence in the record that SCDC in general, or WRCI in particular, had experienced a significant problem with prison employees hiding contraband in body cavities. See *Carey*, 737 F.2d at 208 (absence of evidence that correction officers had carried contraband into the subject correctional facilities in their body cavities indicated that body cavity searches were not related to any legitimate penological objective).

the competing interests.[8]

Leverette does not contend that a search warrant is required for routine "strip" searches of employees, which required the employee to disrobe, squat, and cough, if the prison officials have a reasonable suspicion that the employee may be bringing contraband into the prison. She does contend, that the information Bell received in this case, which consisted of an alleged uncorroborated tip from an unidentified inmate, based on pure hearsay rather than personal knowledge, did not constitute "reasonable suspicion." Even if the strip search was appropriate, however, the visual body cavity search went far beyond the established procedures for strip searches.[9]

Leverette did not subjectively waive her expectation of privacy relating to body cavity searches (visual or manual) by merely accepting employment with the prison system. The policies and procedures in effect during her employment expressly evidenced the prison system's recognition of that expectation. The visual body cavity search at issue clearly violated Leverette's reasonable expectation of privacy, and contravened her Fourth Amendment right to be free of unreasonable searches.

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[8]The Fourth Circuit attempted to draw a distinction between "visual" and "manual" body cavity searches, even though the S.C.D.C. policies make no such distinction. Given the extent of the visual body cavity search in this case, which stopped just short of a manual probe of Leverette's body cavities, the Fourth Circuit essentially drew a distinction without a difference. In any event, as the Second Circuit noted in *Carey*, "a visual body cavity search is nearly as degrading as a manual probe of a body cavity itself." Id. at 208.

[9]As discussed above, the nurse and two female correctional officers who witnessed the search testified they had never participated in any similar searches during their employment with SCDC.

The Fourth Circuit's opinion in this case is contrary to law, and must be reversed.[10]

> A government agency's policies and practices define the parameters of an official's discretionary authority for qualified immunity purposes, and government officials who knowingly act contrary to the agency's policies and practices are not entitled to the qualified immunity defense.

Government officials may be shielded from individual liability for damages arising from acts within the scope of their discretionary authority, provided their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether an official was acting within the scope of his authority, the court must examine what a reasonable official in the defendant's position would have understood the limits of his authority to be, and the official cannot claim qualified immunity for acts he knows to be totally beyond the scope of his authority. *In re Allen*, 106 F.3d 582, 593 (4th Cir. 1997).

The statutes and regulations governing an official's position at the time in question, rather than case law regarding the reach of clearly established statutory or constitutional rights, will most often govern the scope of the official's authority. *Doe v. McMillan*, 412 U.S. 306, 321-324 (1973) (official's authority defined by statutes dictating duties of the Public Printer and Superintendent

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[10]Since the Fourth Circuit held that the search was constitutionally permissible, it did not reach the question of whether the right at issue was "clearly established."

of Documents); *Allen*, 106 F.3d at 595 (statutes regarding duties of state attorney general defined scope of authority); *Lenz v. Winburn*, 51 F.3d 1540, 1546-47 (11th Cir. 1995) (Florida statutes and training manual for Florida guardian ad litem program defined scope of guardian ad litem's authority).

In this case, the Fourth Circuit held that since prison assistant wardens routinely supervise searches, including strip searches and body cavity searches, Bell was acting within the scope of her employment for purposes of analyzing her entitlement to the qualified immunity defense. In reaching this conclusion, the Fourth Circuit ignored the SCDC policies governing Bell's position at the time she conducted the visual body cavity search at issue. Those policies significantly limited the scope of Bell's discretionary authority when ordering and supervising searches, and expressly prohibited the search at issue.

Under SCDC Policy No. 1500.11, wardens (institution heads) are the only officials authorized to ask employees to submit to a "strip" search, and assistant wardens may order such searches only if the warden is absent from the prison. SCDC Policy No. 1500.11, ¶19, Appendix at page A-28. The WRCI warden, Carmichael, was physically present at the prison when Leverette was searched. Therefore, Bell had no discretionary authority to decide whether to search Leverette, or to determine the scope of the search to be conducted.

Carmichael and Bell testified they discussed the Leverette matter on February 2, 3, and 4. Carmichael expressly stated he only authorized a "strip" search during their discussions, and a "body cavity" search was

never discussed or authorized.[11] Since Carmichael only authorized a "strip" search, Bell clearly exceeded the scope of her extremely limited authority when she expanded the search to include a visual body cavity search.

Bell testified that she sought Carmichael's approval before searching Leverette, and that having Leverette squat and cough was "still within policy." Incredibly, Bell claimed the search then expanded only because Leverette herself "suggested" that she bend over further, and manually spread her buttocks and labia, so Bell and the nurse could get a better view.

Bell's acknowledgement that Carmichael's approval was required, and that certain things were "still within policy," combined with her attempt to shift responsibility for the expanded search to Leverette, clearly reveals she was well aware she did not have authority to order any search under the circumstances, and that a visual body cavity search exceeded the scope of the authority she

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[11]Bell testified she informed Carmichael the informant alleged the drugs would be concealed in a tampon, but they never discussed what to do if Leverette was wearing a tampon. Carmichael only recalled that Bell told him the drugs would be "on [Leverette's] person," "in [Leverette's] clothing," or that it might be in a body cavity. Even with that knowledge, Carmichael did not authorize a body cavity search.

received from Carmichael.[12] Given that knowledge, Bell should not be afforded the protection of the qualified immunity doctrine. See *Long v. Norris*, 929 F.2d 1111, 1116-18 (6th Cir. 1991) (qualified immunity did not bar suit against prison officials who violated prison regulations prohibiting strip searches without probable cause). Accordingly, the Fourth Circuit's decision on this issue should be reversed.

CONCLUSION

Even considering the security issues inherent in administering the prison system, prison employees do not waive all Fourth Amendment protection by simply accepting employment in the prison system. Allowing prison officials to conduct visual body cavity searches of prison employees on less than probable cause, and in the absence of exigent circumstances, in essence gives the employees less constitutional protection than the inmates they are hired to guard.

The Fourth Circuit's decision in this case directly conflicts with the Second Circuit's decision in *Security and Law Enforcement Employees v. Carey*, supra, which held that prison officials must have a warrant, based on probable cause, prior to conducting visual body cavity searches of prison employees. The Second Circuit's

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[12]In addition to going beyond the scope of the search authorized, Bell did not 1) obtain Leverette's consent prior to conducting the search, 2) maintain the signed consent form for subsequent review, or 3) reduce her basis for the search to writing either prior to or immediately after the search (waiting nineteen days), all of which are expressly required by Policy 1500.11. The Fourth Circuit avoided the impact of these cumulative omissions by classifying them as mere technical, and unimportant, deviations from SCDC's formal policies and procedures. (Appendix at pages A-14 - A-15)

reasoning is sound, and reflects the same balancing of the prison system's security concerns and the employees' constitutional rights as that embodied in SCDC's policies and procedures. The Fourth Circuit ignored the balance reflected in those policies and procedures, and improperly substituted its own judgment for the judgment of South Carolina's prison administrators.

SCDC also determined specific parameters for authorizing employee searches, including express limitations on the officials authorized to determine if an employee can be searched, and the scope of the search to be conducted. The Fourth Circuit ignored those parameters in holding that Bell acted within the scope of her authority in connection with the search at issue. Bell knowingly exceeded her authority, and should not be afforded qualified immunity protection. Accordingly, the Fourth Circuit decision should be reversed.

This the 9th day of August, 2001.

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